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Attorneys for: Material Witness PEDRO NIETO-ROJAS

**UNITED STATES DISTRICT COURT  
 SOUTHERN DISTRICT OF CALIFORNIA**

UNITED STATES OF AMERICA,

Plaintiff,

v.

GERARDO SALTO-ROCHA (1),

JOSE HERNANDEZ-RIVAS (2),

Defendants.

Criminal Case No. 08 cr 2430-BTM  
 Mag. Docket No. 08 mj 2098

**AMENDED NOTICE OF MOTION AND  
 MOTION FOR VIDEO DEPOSITION  
 AND RELEASE OF MATERIAL  
 WITNESS PEDRO NIETO-ROJAS**

JUDGE: Hon. Barry Ted Moskowitz  
 CRTRM: 15, Fifth Floor

DATE: August 15, 2008  
 TIME: 2:30 p.m.

TO KAREN P. HEWITT, UNITED STATES ATTORNEY, PETER MAZZA,  
 ASSISTANT UNITED STATES ATTORNEY, KAREN M. STEVENS, ESQ., COUNSEL FOR  
 DEFENDANT GERARDO SALTO-ROCHA, AND DAVID BAKER, ESQ., COUNSEL FOR  
 DEFENDANT JOSE HERNANDEZ-RIVAS.

**PLEASE TAKE NOTICE** that on **August 15, 2008, at 2:30 p.m.**, Gayle Mayfield-Venieris, Esq., counsel for the material witness PEDRO NIETO-ROJAS ("NIETO") will move this Court for an order to take the video deposition of the material witness, and for his immediate release. At the request of Judge Moskowitz, the August 14, 2008 hearing in front of Judge McCurine has been taken off calendar and the hearing will now take place in front of Judge Moskowitz as set forth herein.

**MOTION**

Material witness NIETO, through his counsel, Gayle Mayfield-Venieris, and pursuant to Federal Rules of Criminal Procedure, Rule 15, 18 U.S.C. §§ 3142 and 3144, hereby moves this Court for an order to take his deposition by videotape and release him at the conclusion of the deposition.

This Motion is based on this Notice and the Memorandum of Points and Authorities attached and filed herewith, the records of the above-entitled case, and all matters submitted to the Court prior to the determination of this Motion.

Dated: August 11, 2008

Mayfield & Associates

By: /s/ Gayle Mayfield-Venieris  
Gayle Mayfield-Venieris, Esq.  
Attorney for Material Witness  
PEDRO NIETO-ROJAS

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Criminal Case No. 08 cr 2430-BTM  
 Mag. Docket No. 08 mj 2098

**MEMORANDUM OF POINTS AND  
 AUTHORITIES IN SUPPORT OF  
 MOTION FOR VIDEO DEPOSITION  
 AND RELEASE OF MATERIAL  
 WITNESS PEDRO NIETO-ROJAS**

JUDGE: Hon. Barry Ted Moskowitz  
 CRTRM: 15, Fifth floor

DATE: August 15, 2008  
 TIME: 2:30 p.m.

Material witness PEDRO NIETO-ROJAS, by and through his designated counsel,  
 GAYLE MAYFIELD-VENIERIS, submits the following Memorandum of Points and  
 Authorities in support of his Motion for Videotape Deposition and Release at the conclusion  
 thereof.

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**I.****STATEMENT OF FACTS**

Material witness, PEDRO NIETO-ROJAS (“NIETO”) was apprehended on July 8, 2008, in Carrizo Springs by United States Border Patrol Agents. Defendants JOSE HERNANDEZ-RIVAS and GERARDO SALTO-ROCHA, the alleged guides of the groups, are charged with bringing in aliens resulting in death in violation of Title 8, United States Code, Section 1324 (a)(a)(A)(i) among other charges. Material witness NIETO remains in custody and he has no prospects for securing release on bond.

**II.****SUMMARY OF ARGUMENT**

No material witness may be held in custody merely because he cannot provide surety for a bond. Once the material witness moves to take his own videotape deposition, the court must order a video deposition unless the opposing party meets its burden to show video deposition and release of the material witness would result in a failure of justice. While the defendant has made no showing of a failure of justice, NIETO, has been unable to secure bond during the three weeks he has been in custody. Thus, given the defendant’s inability to show a failure of justice and the fact that NIETO is a minor, the material witness must be immediately deposed and released.

**III.****POINTS AND AUTHORITIES****A. *Deposition is Mandated by Statute*****1) 18 U.S.C.S. § 3144**

Congress specifically enacted a statute to deal with the issue presented in this case, i.e., material witnesses who remain incarcerated owing solely to their inability to secure bond. In unmistakably plain language, Congress outlawed prolonged incarceration of such persons without substantial justification. “No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can be secured by deposition, and if further detention is not necessary to prevent a failure of justice.” *18 U.S.C*

§ 3144. “Upon such a showing, the district court must order [the witness’] deposition and prompt release.” *Torres-Ruiz v. United States District Court for the Southern District of California*, 120 F.3d 933, 935 (9th Cir. 1997) (*quoting Aguilar-Ayala v. Ruiz*, 973 F.2d 411, 413 (5th Cir. 1992)) (emphasis in original).

## 2) Federal Rule of Criminal Procedure 15

Federal Rules of Criminal Procedure, Rule 15(a)(2), provides that

A witness who is detained under 18 U.S.C. § 3144 may request to be deposed by filing a written motion and giving notice to the parties. The court may then order that the deposition be taken and may discharge the witness after the witness signs under oath the deposition transcript.

Under such circumstances, “[i]f the deposition would prove admissible over any objection under the Confrontation Clause of the United States Constitution or the Federal Rules of Evidence, then the material [witness] must be deposed rather than detained.” *Aguilar-Ayala*, 973 F.2d at 413 (emphasis added).

Prolonged incarceration of NIETO solely because of his inability to secure bond thus violates the clearly stated intent of Congress and straightforward rulings by the Court of Appeals prohibiting such practices. “[I]t is clear from a conjunctive reading [of Rule 15(a)] with [Section] 3144 that the discretion to deny the motion is limited to those instances in which the deposition would not serve as an adequate substitute for the witness’ live testimony: that a failure of justice would ensue were the witness released. Absent a failure of justice, the witness must be released.” *Torres-Ruiz*, 120 F.3d at 935 (*citing Aguilar-Ayala*, at 413 (internal citations and quotations omitted)).

## 3) Defendant Has Not Met His Burden to Defeat the Motion for Video Deposition

To defeat a motion for video deposition of a material witness, the burden is on the opposing party to show admission of deposition testimony will result in a “failure of justice.” 18 U.S.C.S. § 3144; *Torres-Ruiz*, at 935. To meet this burden, the defendant must make a plausible

1 showing the witness' testimony would be both material and favorable to his defense. *See United*  
2 *States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982).

3 In *Valenzuela-Bernal*, the defendant was charged with transporting an illegal alien.  
4 *Valenzuela-Bernal*, 458 U.S. at 860. The Government detained the illegal alien as a material  
5 witness (Witness No. 1) but deported two other witnesses (Witnesses Nos. 2 and 3) (also illegal  
6 aliens) before defendant was able to interview them. *Id.* at 861. Defendant appealed, claiming  
7 deportation of Witnesses Nos. 2 and 3 deprived him of the opportunity to determine whether  
8 their testimony would aid his defense. *Id.* According to the Supreme Court, even though the  
9 defendant knew what Witnesses 2 and 3 might have said to him to indicate whether Witness No.  
10 1 had legal status to be present in this country, the defendant failed to show how the deported  
11 witnesses' testimony would have been helpful to his defense. *Id.* at 874.

12 [I]t should be remembered that [defendant] was present throughout  
13 the commission of this crime. No one knows better than he what  
14 the deported witnesses actually said to him, or in his presence, that  
15 might bear upon whether he knew that [Witness No. 1] was an  
16 illegal alien who had entered the country within the past three  
17 years. And, in light of the actual charge made in the indictment, it  
18 was only the status of [Witness No. 1] which was relevant to the  
19 defense. [Witness No. 1], of course, remained fully available for  
20 examination by the defendant and his attorney. We thus conclude  
21 that the [defendant] can establish no Sixth Amendment violation  
22 without making some plausible explanation of the assistance he  
23 would have received from the testimony of the deported witnesses.

19 *Valenzuela-Bernal*, 458 U.S. at 871.

20 The Supreme Court's reasoning applies with even greater force in this case. In  
21 *Valenzuela-Bernal*, the witnesses were deported before the defendant had the opportunity to  
22 interview them. Here, the defendant has had the opportunity to interview the material witness  
23 while he has been incarcerated for the past three weeks. Despite this opportunity, the defendant  
24 has produced no evidence, nor has the defendant made any showing the witness has material  
25 information helpful to the defense. In short, the defendant has made no showing of a failure of  
26 justice. Consequently, the material witness must be deposed and released.

**B. A Material Witness Does Not Have to Show Exceptional Circumstances To Request A Videotape Deposition.**

The plain language of Federal Rules of Criminal Procedure, Rule 15(a)(2) demonstrates that a material witness who files a motion for his own deposition is not required to demonstrate exceptional circumstances. Where a material witness moves for a Rule 15 deposition, he need not show such “exceptional circumstances.” *United States v. Chen*, 214 F.R.D. 578, 579 (N.D. Cal. 2003); *see also, Aguilar-Ayala v. Ruiz*, 973 F.2d at 420 (5<sup>th</sup> Cir. 1992) (ff. 6); *United States v. Allie*, 978 F.2d 1401, 1404 (5<sup>th</sup> Cir. 1992).

“Witnesses detained under § 3144 are explicitly excepted from demonstrating exceptional circumstances to effectuate their own deposition.” *Aguilar-Ayala v. Ruiz*, 973 F.2d at 420 (5<sup>th</sup> Cir. 1992) (ff. 6)(emphasis added); *see also, United States v. Allie*, 978 F.2d 1401, 1404 (5<sup>th</sup> Cir. 1992). Indeed, Rule 15(a)(2), which addresses the process for a detained material witness to seek a deposition, does not even mention exceptional circumstances.

The confusion regarding the requirement of exceptional circumstances was clarified in 2002 when Congress amended Rule 15(a) to distinguish motions brought by material witnesses for depositions from motions brought by other parties, *United States v. Chen*, 214 F.R.D. at 580 (ff. 2), thus implying that motions for a deposition brought by a material witness does not require a showing of exceptional circumstances. “Before the amendment, it was unclear whether the ‘exceptional circumstances’ standard applied when a material witness moved for a deposition. The amendment makes clear that this heightened standard only applies to a motion made by a party.” *United States v. Chen*, 214 F.R.D. at 580 (ff. 2)(emphasis in original). Only Rule 15(a)(1), which addresses where a party seeks a deposition of a prospective witness, addresses the exceptional circumstances requirement. Thus, it is only where parties other than the detained material witness file a motion for the witness’ deposition that a showing of exceptional circumstances is required. *See, Fed. Rule Crim. Pro., Rule 15(a)(1)*; *see also, Chen*, 214 F.R.D. at 579; *Allie*, 978 F.2d at 1404.

Therefore, material witness NIETO does not have to make a showing of exceptional circumstances.



1 **C. Deposition Preserves Defendants' Rights**

2 **1) Deposition Preserves Defendant's Sixth Amendment Right to**  
 3 **Confrontation**

4 Under ideal circumstances, the material witness would be deposed and released and  
 5 would subsequently return for the defendant's trial. The Office of the United States Attorney in  
 6 fact employs well-established procedures to ensure such a result. Prior to release, the  
 7 Government is required to serve each material witness with a subpoena for the trial date and a  
 8 travel fund advance letter. Thus, under ideal circumstances, each material witness would return  
 9 for trial and questions about preserving defendant's right to confront and cross-examine the  
 10 material witnesses would be moot.

11 Even if the material witness does not return for trial, his deposition will be admissible in  
 12 lieu of live testimony. *See Rivera*, at 1207. Admission of prior-recorded testimony by a witness  
 13 who is unavailable for trial has in fact been upheld for more than a century. In 1895, the  
 14 Supreme Court held admission of testimony given at a defendant's first trial by a witness who  
 15 died before the second trial did not violate the confrontation clause. *Mattox v. United States*, 156  
 16 U.S. 237 (1895). Since that time, courts have consistently upheld the principle that prior-  
 17 recorded testimony later admitted at trial does not violate a defendant's Sixth Amendment  
 18 confrontation rights so long as: (1) there is some exceptional circumstance where, in the interests  
 19 of justice, it is necessary to take and preserve testimony outside the court; (2) the prior testimony  
 20 was given at a hearing, proceeding or deposition; (3) an authorized person put the witness under  
 21 oath; (4) the defendant had the right to be present; (5) the defendant was represented by counsel  
 22 who was given a complete and adequate opportunity to cross-examine the witness; and (6) the  
 23 witness meets the criteria for unavailability. *See Fed. R. Civ. P. 28 and 30; Fed. R. Evid. 804(a);*  
 24 *see also California v. Green*, 399 U.S. 149, 165-166 (1970); *Torres-Ruiz* at 933; *Aguilar-Ayala*  
 25 *at 413.*

26 As shown above, this case, the interests of justice mandate taking and preserving the  
 27 material witness's testimony outside the court, i.e., by video deposition. The defendant's rights  
 28 under the Sixth Amendment are preserved by the statutory requirements for a deposition,

1 including the presence of a person authorized to put the witness under oath, the defendant's right  
 2 to be present, the defendant's right to be represented by counsel, and the defendant's right to  
 3 completely and adequately cross-examine the witness. *See* Fed. R. Civ. P. 28 and 30. Moreover,  
 4 these procedural requirements provide a sufficient indicia of reliability to "[a]fford the trier of  
 5 fact a satisfactory basis for evaluating the truth of the prior statement," further protecting  
 6 defendant's rights under the confrontation clause. *California v. Green*, 399 U.S. at 161.

7 Finally, if a material witness fails to return for trial, the deposition will be admissible, as  
 8 the material witness would meet the requirements for unavailability. In the context of this case,  
 9 an unavailable witness is one who is out of the United States, providing the absence of the  
 10 witness was not procured by the party offering the deposition, or a witness whose attendance  
 11 cannot be procured by subpoena. *See* Fed. R. Crim. P. 15; Fed. R. Evid. 804(a). Where a  
 12 material witness has left the United States voluntarily or even by forced deportation, the witness'  
 13 later absence from trial does not violate the defendant's rights under the confrontation clause  
 14 provided the Government makes a reasonable effort to assure the witness' attendance at trial.  
 15 *Aguilar-Ayala*, at 418 (quoting *Ohio v. Roberts*, 448 U.S. 56, 65 (1980)); *see also Rivera*, at  
 16 1207.

17 In *U.S. v. Eufracio-Torres*, before the material witnesses were forcibly deported, the  
 18 Government, using procedures similar to those presently employed in the Southern District of  
 19 California, served them with trial subpoenas and instructed them on how to return for trial and  
 20 obtain the necessary travel funds. *U.S. v. Eufracio-Torres*, 890 F. 2d 266, 270 (1989). Although  
 21 the witnesses did not appear for trial, the Court of Appeals held their deposition testimony was  
 22 admissible under such circumstances, where the Government used "good faith" and "reasonable  
 23 means" to assure that the witnesses would attend trial. *U.S. v. Eufracio-Torres*, 890 F. 2d at 271.  
 24 "So long as the government has employed reasonable measures to secure the witness' presence at  
 25 trial, the fact that the witness has nevertheless failed to appear will not preclude the admission of  
 26 deposition testimony. Such a witness will be deemed 'unavailable' and the deposition is  
 27 admissible over the defendant's Confrontation Clause and hearsay objections." *Aguilar-Ayala*,  
 28 at 418 (quoting *Ohio v. Roberts*, 448 U.S. at 65); *see also* Fed. R. Evid. 804(a).

Thus, even if the United States Attorney's reasonable and well-established procedures fail to obtain the material witness's attendance at trial, statutory procedures for the taking of the deposition preserves defendant's Sixth Amendment confrontation rights, and the deposition will be admissible at trial.

**2) Deposition Preserves Defendant's Sixth Amendment Right to Compulsory Process**

"The only recent decision of this Court dealing with the right to compulsory process guaranteed by the Sixth Amendment suggests that more than the mere absence of testimony is necessary to establish a violation of the right." *See Valenzuela-Bernal*, at 867 (witnesses deported before interviewed by defendant). "Indeed, the Sixth Amendment does not by its terms grant to a criminal defendant the right to secure the attendance and testimony of any and all witnesses: it guarantees him 'compulsory process for obtaining witnesses in his favor.'" *Valenzuela-Bernal*, at 867, (quoting U.S. Const., Amdt. 6). "[D]efendant cannot establish a violation of his constitutional right to compulsory process merely by showing that deportation of the [witness] deprived him of [his] testimony. He must at least make some plausible showing of how [his] testimony would have been both material and favorable to his defense." *See Valenzuela-Bernal*, at 867 (emphasis added); *see also* Fed. R. Crim. P. 17(b) (requiring Government to subpoena witnesses on behalf of indigent defendants "upon a satisfactory showing . . . that the presence of the witness is necessary to an adequate defense.").

In this case, material witness NIETO has been in custody since July 8, 2008. Since that time, the material witness has been available for interview by both defense counsel and the Assistant United States Attorney, who thus have had an ample opportunity to ascertain the substance of any testimony the material witness might provide at trial. Because the material witness's testimony can be adequately preserved by video deposition and he is subject to the subpoena power of this Court, further detention is not necessary to prevent a failure of justice.

Moreover, a guarantee from the Government that the material witness will return for trial is not a prerequisite for an order for video deposition. The Government is required only to use reasonable means to insure the appearance of the material witness. *See Aguilar-Ayala*, at 418.

1 “We gather from these cases that deposition testimony is admissible only if the government has  
 2 exhausted reasonable efforts to assure that the witness will attend trial. The ultimate success or  
 3 failure of those efforts is not dispositive. So long as the government has employed reasonable  
 4 measures to secure the witness’ presence at trial, the fact that the witness has nevertheless failed  
 5 to appear will not preclude the admission of deposition testimony. Such a witness will be  
 6 deemed ‘unavailable.’” *Aguilar-Ayala*, at 418 (*citing Ohio v. Roberts*, at 65). Because the  
 7 material witness’ testimony can be adequately preserved by video deposition and he is subject to  
 8 the subpoena power of this Court, the defendant’s rights to compulsory process are protected and  
 9 the Court must order the deposition and release of the material witness.

10 **3) Deposition Preserves Defendant’s Fifth Amendment Right to Due**  
 11 **Process**

12 “Due process guarantees that a criminal defendant will be treated with ‘that fundamental  
 13 fairness essential to the very concept of justice. In order to declare a denial of it we must find  
 14 that the absence of that fairness fatally infected the trial; the acts complained of must be of such  
 15 quality as necessarily prevents a fair trial.” *Valenzuela-Bernal*, at 872, (*quoting Lisenba v.*  
 16 *California*, 314 U.S. 219, 236 (1941)). In another context, the Supreme Court held that instances  
 17 where the Government withholds evidence required by statute to be disclosed constitute due  
 18 process violations only when they “so infect the fairness of the trial as to make it ‘more a  
 19 spectacle or trial by ordeal than disciplined contest.’” *Valenzuela-Bernal*, at 872, (*quoting*  
 20 *United States v. Augenblick*, 393 U.S. 348, 356 (1969)) (citations omitted). For there to be a due  
 21 process violation by release of the material witnesses in this case, the defendant must provide  
 22 “some explanation of how their testimony would have been favorable and material.” *Id.*

23 **IV.**

24 **CONCLUSION**

25 Based on the discussion above, material witness NIETO respectfully moves the Court for  
 26 an order requiring his video deposition to be taken as soon as possible, and for his immediate  
 27 release from custody upon conclusion of the deposition.

MAYFIELD & ASSOCIATES  
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SOLANA BEACH, CA 92075-2066

Date: August 11, 2008

Mayfield & Associates

By: /s/ Gayle Mayfield-Venieris  
Gayle Mayfield-Venieris, Esq.  
Attorney for Material Witness  
PEDRO NIETO-ROJAS

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**PROOF OF SERVICE VIA E-FILE**  
**[Fed. R. Civ. Pro. 4, Local Rule 5]**

I, Melissa L. Bustarde, declare as follows:

1. I am over eighteen years of age and not a party to the above-referenced action; my business address is 462 Stevens Avenue, Suite 303, Solana Beach, CA 92075-2066. I am employed in San Diego County, California.

2. On August 11, 2008, I filed the aforementioned document on the Court's CM/ECF system in Case No. 08 mj 2098/08 cr 2430-BTM. The following counsel were electronically served with the aforementioned document via the CM/ECF system pursuant to Local Rule 5.4(c):

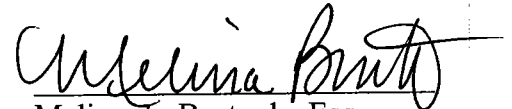
- **Motion to Shorten Time**
- **Notice of Motion and Motion to take deposition by Video**
- **Points and Authorities in Support of Motion for Video Deposition**

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I declare under penalty of perjury under the laws of the United States, State of California  
that the foregoing is true and correct and that this declaration was executed on August 11, 2008.

  
Melissa L. Bustarde, Esq.  
Mayfield & Associates

MAYFIELD & ASSOCIATES  
ATTORNEYS AT LAW  
462 STEVENS AVENUE, SUITE 303  
SOLANA BEACH, CA 92075-2066